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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 411

EUGENE F. MURPHY and
THE TRAVELERS INSURANCE COMPANY,
Petitioners,

versus

THE ST. PAUL FIRE AND MARINE
INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
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NO.

EUGENE P. MURPHY and
THE TRAVELERS INSURANCE COMPANY,
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versus

THE ST. PAUL FIRE AND MARINE
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 30, 1963, and the denial by said Court of petition for rehearing on June 20, 1963.

CITATIONS TO OPINIONS BELOW

This case was a jury trial in which the District Court did not enter an opinion. The opinion of the Circuit Court of Appeals is reported at 314 F. 2d. 30.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on the 30th day of January, 1963. Rehearing was denied on June 20, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether a party is entitled to a new trial when the party properly prosecutes an appeal from a judgment, but is unable to lodge the record on appeal due to the destruction of the record while in the possession of the official court reporter.

STATUTE INVOLVED

The statutory provision involved is Rule 75 of the Federal Rules of Civil Procedure.

STATEMENT

Eugene P. Murphy was an employee of the Chrysler Corporation and was at the time of his injury working in the course and scope of his employment at the Michoud Plant. Murphy was required to stand on a steel scaffold to perform certain repairs to an overhead piping system at the plant. A screw-jack forming a portion of the lower leg of the steel scaffold collapsed causing the scaffold to tip over and throwing Murphy off the scaffold and down to the concrete floor a distance of approximately 45 feet. Murphy received serious and permanent injuries and filed suit against St. Paul Fire and Marine Insurance Company,

the liability insurer of the manufacturer of the scaffold, Safeway Products, Inc. The Travelers Insurance Company as the Louisiana Workmen's Compensation Insurer of the Chrysler Corporation paid compensation benefits and incurred medical expenses for Murphy's treatment and then entered into a compensation settlement with Murphy. The Travelers Insurance Company also filed suit against St. Paul Fire and Marine Insurance Company and appears in this Court as a petitioner.

The case was tried in the District Court with a jury and was submitted to the jury by the District Court on certain instructions covering the law. Petitioners objected to certain of these instructions and following an adverse judgment by the jury, petitioners filed an appeal specifying that the District Court had incorrectly instructed the jury in the Court's charge to the jury. The record in the case was delivered to the official court reporter, a federal employee assigned to this District Court. The court reporter had taken the entire testimony and charges of the court, together with objections to the charges by means of a voice-graph. The entire transcript of the trial in the District Court was thus reduced to plastic recording discs by the court reporter. During the time that the court reporter was engaged in transcribing the record for appeal, the recording discs were inadvertently destroyed by him with the result that the entire charge of the District Court of the jury together with petitioners' objections to the charge were destroyed and made incapable of reproduction.

At a conference with all parties, the District Judge indicated that he did not feel that he could reconstruct the charge. The remaining record in the case was transcribed

and the appeal lodged with the Court of Appeals for the Fifth Circuit. That court affirmed the judgment in the District Court and its opinion indicated that under Rule 75(n) of the Federal Rule of Civil Procedure the petitioners should have attempted to reconstruct the charge to bring a sufficient record before the Court.

REASONS FOR GRANTING THE WRIT

The Jurisprudence supports the proposition that whenever a part of the transcript is destroyed through no fault of a litigant and for that reason the appellant is unable to lodge a complete transcript upon which the Appellate Court can review the judgment, then appellant is entitled to a new trial.

Barton vs. Burbank, 119 La. 224, 43 So. 1014 (1907), *Dauchite Lbr. Co. vs. Lane*, 52 La. Ann. 1937; *Meyer vs. Dupree*, 25 La. Ann. 216 (1873); *Miller vs. Shotwell*, 38 La. Ann. 103 (1886); *Nichols vs. Harris*, 32 La. Ann. 646 (1880); *Reynolds vs. Romona*, 96 Vt. 222, 118 A. 810 (1922); *Schoefer vs. King*, 82 Col. 258, 259 P. 1042 (1927); *Gibson vs. Chickasha*, 171 Okla. 284; 43 P. 2d 95 (1934); *Duncan vs. Abrams*, 171 Okla. 619, 43 P. 2d 720 (1935).

See also: *Chessman vs. Teets*, 354 U.S. 156, 1 L. Ed. 2d 1253 (1957).

The opinion of the Court of Appeals for the Fifth Circuit is clearly in error as seen by the mere reading of Rule 75(n) of the Federal Rules of Civil Procedure. The Rule provides that in the event no stenographic report of the evidence or proceedings of a trial is made, then the appellant may pre-

pare a statement of evidence and submit it to the opposing side and any dispute will then be decided by the District Judge who tried the case. The notes of the Advisory Committee on the Amendments to the rules found at 28 U.S.C.A. page 487 indicates as follows:

> "Subdivision N. — Subdivision N provides a method whereby a record may be prepared in the perhaps rare case where there is no reporter present at all and no stenographic report is made of the proceedings. Normally, these situations are now unlikely in view of Public Law 222, 78th Congress, C. 3 Section 1 2d Sess., approved January 20, 1944, 28 U.S.C.A. § 9 (a) providing for the appointment of official court reporters, prescribing their duties and providing for the payment by the United States of fees for transcripts for appeals in forma pauperis."

Rule 75(n) was adopted and specifically only applies when no stenographic report of the evidence was made. In this case, a stenographic report of the trial charges and objections was actually made by the court reporter under the specific dictates of the court reporters' act, 28 U.S.C. 753.

Further, an attempt was made to reconstruct the record including the destroyed portions and a conference was had between petitioners' attorneys, defendant's attorneys and the District Judge. At the conference, the District Judge indicated that he would not attempt to reconstruct this charge, because although he gave the charge, he did not have complete notes on exactly what the charge consisted of and he could not reconstruct it. This is amply brought

out at the hearing on Appellant's motion on February 19, 1962, Supp. Tr. p. 2, wherein it is stated as follows:

> "The court: I think there is no alternative but to have a new trial, because I have informed counsel that I do not believe that I could reconstruct the charge — so concisely that I could guarantee it was the same charge. The sole basis of the appeal is the one portion of the charge. I don't think I should try to reconstruct it."

Further, at page 4 of the Supplemental Transcript:

> "The court: I think it would be wrong for me to try to, now knowing that there is an appeal pending and not having written charge in the sense that I wrote the whole charge out in advance, I think it would be a mistake to try to say what I gave. I am not willing to do that, although I am not anxious to try a three (3)-day case over again either."

The trial judge who gave this charge unequivocally stated to all attorneys that he felt it would be improper to make an attempt on his part to reconstruct the charge and refused to do so. Even if Rule 75(n) were applicable it would be a futile requirement on part of any litigant to attempt to reconstruct a charge when the party actually giving the charge cannot reconstruct the charge and when that same party under Rule 75(n) would act as mediator on disputes. Clearly in this case the charges and petitioners' objections cannot be reconstructed.

It is respectfully concluded that an interpretation of Rule 75(n) of the Federal Rules of Civil Procedure holding said rule to be applicable to this case is erroneous. It is further submitted that when an essential element of a transcript on appeal is destroyed through no fault of the litigant, that the litigant is entitled as a matter of law to a new trial.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto.

APPENDIX A

STATUTE

Rule 75. Record on Appeal to a Court of Appeals

(a) Designation of Contents of Record on Appeal. Promptly after an appeal to a court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal, unless the appellee has already served and filed a designation. Within 10 days after the service and filing of such a designation, any other party to the appeal may serve and file a deignation of additional portion of the record, proceedings, and evidence to be included. If the appellee files the original designation, the parties shall proceed under subdivision (b) of this rule as if the appellee were the appellant. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

(b) Transcript. If there be designated for inclusion any evidence or proceeding at a trial or hearing which was stenographically reported, the appellant shall file with his designation a copy of the reporter's transcript of the evidence or proceedings included in this designation: If the designation includes only part of the reporter's transcript, the appellant shall file a copy of such additional parts thereof as the appellee may need to enable him to designate and file the parts he desires to have added, and if the appellant fails to do so the court on motion may require him to furnish the additional parts needed. The copy so filed by the appellant shall be available for the use of the other parties. In the event that a copy of the reporter's transcript or of the necessary portions thereof is already on file, the ap-

pellant shall not be required to file an additional copy. When the rules of the court of appeals so require, the appellant shall furnish a second copy of the transcript for use in the appellate court. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

(c) Form of Testimony. Testimony of witnesses designated for inclusion need not be in narrative form, but may be in question and answer form. A party may prepare and file with his designation a condensed statement in narrative form of all or part of the testimony, and any other party to the appeal, if dissatisfied with the narrative statement, may require testimony in question and answer form to be substituted for all or part thereof.

(d) Statement of Points. No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal. As amended Dec. 27, 1946, effective March 19, 1948.

(e) Record To Be Abbreviated. All matters not essential to the decision of the questions presented by the appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document shall be excluded. Documents shall be abridged by omitting all irrelevant and formal portions thereof. For any infraction of this rule or for the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the appellate court may withhold or impose costs as the circumstances of the case and discourage-

ment of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties.

(f) Stipulation as to Record. Instead of serving designations as above provided, the parties by written stipulation filed with the clerk of the district court may designate the parts of the record, proceedings, and evidence to be included in the record on appeal.

(g) Record to be Prepared by Clerk — Necessary Parts. The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The clerk shall transmit with the record on appeal a copy thereof when a copy is required by the rules of the court of appeals. The copy of the transcript filed as provided in subdivision (b) of this rule shall be certified by the clerk as a part of the record on appeal and the clerk may not require an additional copy as a requisite to certification. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

(h) Power of Court to Correct or Modify Record. It is not necessary for the record on appeal to be approved by the district court or judge thereof except as provided in subdivisions (m) and (n) of this rule and in Rule 76, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the court of appeals. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

(i) Order as to Original Papers or Exhibits. Whenever the district court is of opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper.

(j) Record for Preliminary Hearing in Appellate Court. If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the appellate court a motion for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on the supersedeas bond,

or for any intermediate order, the clerk of the district court at his request shall certify and transmit to the appellate court a copy of such portion of the record or proceedings below as is needed for that purpose.

(k) Several Appeals. When more than one appeal is taken to the same court from the same judgment, a single record on appeal shall be prepared containing all the matter designated or agreed upon by the parties, without duplication.

(l) Printing. What part of the record on appeal filed in the appellate court shall be printed and the manner of the printing and the supervision thereof shall be as prescribed in the rules of the court to which the appeal is taken; but the type, paper, and dimensions of printed matter in the court of appeals shall conform to the Rules of the Supreme Court relating to records on appeals to that court. As amended Dec. 29, 1948, effective Oct. 20, 1949.

(m) Appeals in Forma Pauperis. Upon leave to proceed in *forma pauperis*, the district court may by order specify some different and more economical manner by which the record on appeal may be prepared and settled, to the end that the appellant may be enabled to present his case to the appellate court. Added Dec. 27, 1946, effective March 19, 1948.

(n) Appeals When No Stenographic Report Was Made. In the event no stenographic report of the evidence or proceedings at a hearing or trial was made, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection, for

use instead of a stenographic transcript. This statement shall be served on the appellee who may serve objections or propose amendments thereto within 10 days after service upon him. Thereupon the statement, with the objections or proposed amendments, shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the court in the record on appeal. Added Dec. 27, 1946, effective March 19, 1948.

(o) Rule for Transmission of Original Papers. Whenever a court of appeals provides by rule for the hearing of appeals on the original papers, the clerk of the district court shall transmit them to the appellate court in lieu of the copies provided by this Rule 75. The transmittal shall be within such time or extended time as is provided in Rule 73(g), except that the district court by order may fix a shorter time. The clerk shall transmit all the original papers in the file dealing with the action or the proceeding in which the appeal is taken, with the exception of such omissions as are agreed upon by written stipulation of the parties on file, and shall append his certificate identifying the papers with reasonable definiteness. If a transcript of the testimony is on file the clerk shall transmit that also; otherwise the appellant shall file with the clerk for transmission such transcript of the testimony as he deems necessary for his appeal subject to the right of an appellee either to file additional portions or to procure an order from the district court requiring the appellant to do so. After the appeal has been disposed of, the papers shall be returned to the custody of the district court. The provisions of subdivisions (h), (j), (k), (l), (m), and (n) shall be applicable but with reference to the original papers as herein provid-

ed rather than to a copy or copies. Added Dec. 27, 1946, effective March 19, 1948; as amended Dec. 29, 1948, effective Oct. 20, 1949.

Notes of Advisory Committee on Rules

This rule applies only to appeals to a circuit court of appeals, and not to the direct appeal from the district court to the Supreme Court of the United States provided for in rule 72. Compare former Equity Rule 75 (Record on Appeal — Reduction and Preparation), former Equity Rule 76 (Record on Appeal — Reduction and Preparation — Costs — Correction of Omissions).

This rule continues U.S.C.A., Title 28, former § 764 (Opinion, findings, and conclusions in action against United States) in so far as that statute relates to the record on appeal, and supercedes U.S.C.A., Title 28, former § 776 (Bill of exceptions; authentication; signing of by judge). The following statutes are modified in so far as they prescribe a different record:

U.S.C.A., Title 28 former:

§ 862 (Removal of causes by former writ of error)
§ 863 (Transcript on appeals)
§ 865 (Printed transcript of record on appeal to circuit court of appeals)
§ 866 (Printed record as part of transcript on appeal to Supreme Court)

Compare Rules 8 and 10 of the Supreme Court of the United States and rules of the various circuit courts of appeals.

Compare U.S.C.A., Title 28, former § 864 (One record) with the provision in the rule for a single record.

Note to Subdivision (c). This rule does not require the narrative form of record nor does it forbid its use. It allows a party to offer a narrative statement and permits his adversary to reject it and substitute question and answer form. The narrative form of testimony has been adversely criticized by the bar, by a considerable section of the bench, and by commentators. For a discussion of this topic, see Griswold and Mitchell, The Narrative Record in Federal Equity Appeals (1929), 42 Harv.L.Rev. 483; Lane, Twenty Years Under the Federal Equity Rules (1933), 46 Harv.L. Rev. 638, as well as the earlier articles by Lane, which are cited therein; Stone, The Record on Appeal in Civil Cases, 23 Va.L.Rev. 766 (1937); Hopkins, Federal Equity Rules (8th ed., 1933), 307, n. 1. The only states which still require the narrative form to be used as in former Equity Rule 75(b) are: Alabama, (limited to bills of exception) Cir. Court Rule 32 (Ala. Code Ann. (Michie, 1928) p. 1939), Turner v. Thornton, 192 Ala. 98, 68 So. 813 (1915), Lone Star Cement Co. of La. v. Wilson, 231 Ala. 83, 163 So. 601 (1935); Arizona, Supreme Court Rule iv (1), (7), (1928) (bills of exception, depositions, statements of facts; but with alternative provision for reporter's transcript, Supreme Court Rule iv, (1), (13); Ariz.Rev.Code Ann. (Struckmeyer, 1928) §§ 3863-3869); Florida, Special Rule 1, Circuit Court Rules at Law, 5 Comp. Gen.Laws (1927) p. 4645-6 (with discretion to trial court to order otherwise); Massachusetts, (bills of exception; compare Connell-Andrews etc. Co. v. Boston

& Providence R. R., 1913, 102 N.E. 625, 215 Mass. 381, and Taylor v. Pierce Bros. Ltd., 1914, 106 N.E. 565, 219 Mass. 187, which indicate that the courts favor a narrative form as opposed to question and answer form); Missouri, (parol evidence in equity cases) Sup.Ct.Rule 7 (1934); Montana, Sup.Ct.Rule vii (1931); North Carolina, Sup.Ct.Rule 19 (4) (N.C. Code Ann. (1935) Appendix VII, p. 2668). Minnesota (Rule 8(2) Sup.Ct., 2 Minn. Stat.(Mason, 1927) p. 2118) and Missouri (in law when the parties disagree Sup.Ct.Rule 6, 1934) allow the narrative form optionally.

Of the forty-two or forty-three states which do not require the narrative form of record, the division is about equal between (1) those which require that a transcript of the entire evidence, as taken by the stenographer, be inserted in the record on appeal so far as it relates to the errors relied upon; for example, Michigan, Court Rules Ann. (Searl, 1933) Rules 66(3) and 66(7); New York, C.P.A. (1937) § 576; Ohio, Code Ann. (Throckmorton, 1936) §§ 12223-8, 12223-32; Wyoming, Rev.Stat. (1931) § 89—4905, and (2) those which permit the full stenographic transcript of relevant evidence to be used in the record on appeal at the option.

APPENDIX B

OPINION & JUDGMENT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19588

EUGENE P. MURPHY and THE TRAVELERS INSURANCE COMPANY,

Appellants,

versus

THE ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(January 30, 1963)

Before RIVES, CAMERON and BELL, Circuit Judges.

CAMERON, Circuit Judge: The question before us is whether appellants are entitled to a new trial as a matter of right, when through no fault of the parties the court reporter is unable to transcribe portions of the record of the trial necessary to the proper presentation of errors assigned and relied upon in this appeal.

Appellant Murphy was injured when a movable metal scaffold or tower, owned by his employer but manufactured by Safeway Steel Products, Inc., toppled. Appellant Travelers Insurance Company paid Murphy workmen's compensation benefits and joined him in this action which was brought under the Louisiana Direct Action Statute[1] against appellee St. Paul Fire and Marine Insurance Company, the insurer of the manufacturer of the scaffold.

The scaffold in question was manufactured and sold in Wisconsin to a distributor, Safeway Steel Scaffolding, Inc., which in turn sold the scaffold to the Chrysler Corporation, employer of appellant Murphy. The scaffold had been owned by Chrysler and in use in its Michoud, Louisiana plant for five years without mishap when the accident occurred.

Appellant Murphy was injured as a result of a fall to the floor of the plant. He was atop the forty-foot movable metal tower or scaffold doing maintenance work on heaters hanging from the ceiling of the building when a steel member of the structure failed, tilting the tower and causing him to fall. The scaffold or tower was so constructed that it rested on four "legs," each terminating as a screw-jack to which a wheel was fastened. The length of the "legs" could be adjusted by manipulation of the screw-jacks so as to adjust the height of the tower and to provide a firm base or foundation.

The member which failed was a solid steel shaft about an inch and a half in diameter, the shaft of the screw-jack. It

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[1] 22 L.S.A. § 655

broke cleanly at a point about a foot above the floor, at the beginning of the threading of the shaft. At the time of the break, the tower was being moved and Murphy was "riding" it. It appears that one of the caster-type wheels rolled into a small hole in the floor, stopping the progress of that leg, whereupon the shaft snapped.

The case was tried to a jury on charges of negligence and breach of implied warranty on the part of the manufacturer, appellee's insured. The jury found for appellee and appellants brought this appeal. However, because certain records in the possession of the court reporter were melted before they were transcribed, the record does not contain that portion of the District Court's charge covering the doctrines of *res ipsa loquitur* and implied warranty. The trial judge was unable to reconstruct the charge from memory and refused to grant a new trial under Rule 66(b) (6), F.R.C.P.[2]

Appellants' position, as stated in the brief, is "purely and simply, that the destruction of this part of the record makes it impossible to properly argue and seek a reversal of" the judgment below. "It would be presumptuous on part of appellants to attempt to reconstruct for the purpose of argument the charge given . . . or to attempt to show for the

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[2] "Rule 60. Relief from Judgment or Order

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment . . ."

purpose of argument the error of the Court. . . ." Appellants urge also that certain rulings on the evidence were erroneous.

Appellee takes the position that, under the evidence presented, appellants were, as a matter of law, not entitled to *any* charge with regard to *res ipsa loquitur*. Appellee contends also that, under Wisconsin law, warranty depends on privity of contract, an element lacking in the case. If the charge contained errors, they were errors of law on the part of the court below and, of course, the presumption is that that court was not in error. It is elementary that the burden is on the appellants to show error. Cf. *Strachan Shipping Co. v. Alexander*, 5 Cir., 1962, — F. 2d —.

The appellants have not availed themselves of the provisions of Rule 75(n), F.R.C.P.,[3] a procedure which might well have enabled them to bring a sufficient record before us. Cf. *Cadby v. Savoretti*, 5 Cir., 1956, 242 F. 2d 751,[4] and *Herring v. Kennedy-Herring Hardware Co.*, 6 Cir., 1958.

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[3] "(n) Appeals When No Stenographic Report Was Made. In the event no stenographic report of the evidence *or proceedings* at a hearing or trial was made, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection, for use instead of a stenographic transcript. This statement shall be served on appellee who may serve objections or propose amendments thereto within 10 days after service upon him. Thereupon the statement, with the objections or proposed amendments, shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the court in the record on appeal." [Emphasis added.]

[4] The appeal was on the basis of a statement: ". . . stipulated pursuant to Rule 75(n) of the Federal Rules of Civil Procedure . . ." at page 752.

261 F. 2d 202.[5] In the absence of compliance with the Rules, the charges urged to be erroneous are not in the record and not before us. *Browder v. United States*, 5 Cir., 1961, 292 F. 2d 44, 49.

An examination of the evidence, moreover, fails to convince us that appellants were entitled to a charge under their claim of breach of implied warranty;[6] or that they developed facts which would warrant a charge under the doctrine of *res ipsa loquitur*.[7]

We have examined appellants' contentions that several

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[5] "Although a stenographic transcript of the evidence is the usual way at the present time in which a review of the evidence and alleged errors therein is presented to the Court of Appeals, it is not the only way in which such a review can be obtained. A satisfactory record, including a narrative statement of the testimony of the witnesses, may at times be prepared through the use of notes taken during the trial by the attorneys and the trial judge, supplemented by memories of the attorneys, witnesses, and the trial judge, by agreement between the parties, and possibly from other sources. Rules 75(n) and 76, Federal Rules of Civil Procedure, 28 U.S.C.A.; Miller v. United States, 317 U. S. 192, 198-200, 63 S. Ct. 187, 87 L. Ed. 179; Middleton v. Hartford Accident & Indemnity Co., 5 Cir., 119 F. 2d 721, 724. Inability to obtain a stenographic transcript of the evidence is not, standing alone, sufficient to set aside a judgment and grant a new trial. Dowling v. United States, 6 Cir., 22 F. 2d 634; People v. Chessman, 38 Cal. 2d 455, 218 P. 2d 769, 19 A.L.R. 2d 1084; State v. Evans, 145 Wash. 4, 258 P. 845; State v. Thompson, 130 Mo. 438, 32 S.W. 975. Compare: City of Duncan v. Abrams, 171 Okl. 619, 43 P. 2d 720. See: Annotation 19 A.L.R. 2d 1104-1108."

[6] Cf. Tri City Fur Foods, Inc. v. Ammerman, S. Ct. Wis., 1959, 96 N.W. 2d 495; Cohan v. Associated Fur Farm, S. Ct. Wis., 1952, 53 N.W. 2d 788; Prinsen v. Russos, S. Ct. Wis., 1927, 215 N.W. 905.

[7] Cf. Plunkett v. United Electric Services, La. S. Ct., 1948, 36 So. 2d 704; Dunaway v. Maroun, La. App., 1937, 178 So. 710, 712; Bish v. Employers Liability Assurance Corp., 5 Cir., 1956, 236 F. 2d 62; Whalen v. Phoenix Indemnity Co., 5 Cir., 1955, 220 F. 2d 78; rehearing denied, 222 F. 2d 121; Chicago, R. I. & P. R. Co. v. McClanahan, 5 Cir., 1949, 173 F. 2d 833.

rulings on the admissibility of evidence were erroneous and find these contentions to be without merit.

Failing to find any reversible error in the record, the judgment of the court below is

AFFIRMED.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 30, 1963

APPENDIX C

(June 20, 1963)

ORDER DENYING PETITION FOR REHEARING

Before RIVES, CAMERON and BELL, Circuit Judges
PER CURIAM:

IT IS ORDERED that the appellants' petition for rehearing be, and it is hereby DENIED.